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SERVICE DATE - OCTOBER 1, 1998

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41608

EXETER ENERGY LIMITED

v.

LALCO, A DIVISION OF NEDMARC, INC.

Decided: September 29, 1998

We are dismissing the complaint of Exeter Energy Limited Partnership (Exeter or complainant) regarding the reasonableness of the tariff rate upon which the subject claim for undercharges in this proceeding is based. We are also denying Exeter's motion to amend its complaint to encompass the issue of whether the recyclable materials exemption from undercharges set forth in former 49 U.S.C. 10733 applies to the shipments at issue.

#### BACKGROUND

On February 23, 1995, LALCO, a division of NEDMARC, Inc. (LALCO or respondent), filed a complaint in the United States District Court for the District of Connecticut, Civil Action No.: 3-95-CV331 (JBA), seeking to collect from Exeter undercharges allegedly due, in addition to amounts previously billed and paid. LALCO was at the time of the filing of its court complaint, and remains, an operating carrier.<sup>2</sup>

On August 16, 1995, Exeter filed a complaint requesting the ICC to determine that the claimed undercharges being sought were based on an unreasonably high tariff rate and were

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA) abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board) effective January 1, 1996. Section 204(b) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, only insofar as they involve functions retained by the Act. This proceeding was pending with the ICC prior to January 1, 1996, but, as discussed in greater detail herein, our rate reasonableness jurisdiction over operating (non-bankrupt) motor carriers was generally not retained. We thus lack jurisdiction to consider the rate reasonableness issue presented.

<sup>2</sup> LALCO filed an amended complaint with the court on August 25, 1995. A copy of the amended complaint is attached as Appendix 3 to respondent's pleading filed on August 5, 1998.

therefore unlawful.<sup>3</sup> By answer and separate motion filed on September 15, 1995, LALCO moved to dismiss the Exeter complaint before the ICC, asserting that the ICC lacked jurisdiction to consider the issue of rate reasonableness in the absence of a court stay and referral of the issue to the ICC for resolution. Respondent further asserted that Exeter failed to make a threshold showing of “unreasonableness” to justify ICC consideration of the issue. In its reply to the motion to dismiss, filed October 26, 1995, Exeter maintains that a court stay and referral is not a prerequisite for the filing of an administrative complaint seeking ICC resolution of a rate reasonableness issue.

On July 30, 1998, Exeter filed a motion to amend its original complaint<sup>4</sup> to encompass whether the recyclable materials exemption from undercharge claims set forth in former 49 U.S.C. 10701(f)(9)(C) and 10733(b)<sup>5</sup> is applicable to the shipments subject to this proceeding. Complainant maintains that the shipments transported by LALCO consisted of “waste products for recycling or reuse in furtherance of a recognized pollution control program.”<sup>6</sup>

In its reply filed August 5, 1998, in opposition to complainant’s motion to amend, LALCO argues that: (1) the proposed amendment is untimely; (2) the Board does not have “exclusive jurisdiction” to determine whether the recyclable materials exemption is applicable to the subject shipments; and (3) permitting the requested amendment would not allow for disposition of all the issues pending in the court proceeding and thus would not result in “judicial economies.”

## DISCUSSION AND CONCLUSIONS

We will grant the LALCO motion to dismiss because we lack general jurisdiction to determine the reasonableness of rates charged by operating (non-bankrupt) carriers. We will also deny Exeter’s motion to amend its original complaint to allow for consideration of the recyclable materials issue.

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<sup>3</sup> By order dated February 1, 1996, the court denied Exeter’s motion to stay action in the court proceeding pending disposition of the complaint before the ICC.

<sup>4</sup> On the same date, complainant filed a separate motion for expedited handling.

<sup>5</sup> The ICC Termination Act reenacted former 49 U.S.C. 10701(f)(9)(C) and 10733(b) as 49 U.S.C. 13709(h)(1)(C) and 13709(h)(2), respectively.

<sup>6</sup> Earlier, on June 4, 1998, Exeter filed a motion with the court requesting stay of the proceedings and referral to the Board for resolution of the issue of the recyclable materials exemption. The Board is not aware of a court ruling on this motion as of the date of this decision.

## I. Rate Reasonableness

Under section 204(b) of the ICCTA, the Board may decide pre-ICCTA cases only if the underlying regulatory function has been retained. The statute no longer contains general rate reasonableness provisions for operating motor carriers of property. See current 49 U.S.C. 13701.<sup>7</sup> Thus, because LALCO is an operating carrier, we lack jurisdiction to determine whether the higher tariff rates it now seeks to assess are reasonable.

The ICCTA retained broader rate provisions for non-operating carriers than for operating carriers. For non-operating carriers, the statute retains provisions for resolving rate reasonableness issues raised in pre-ICCTA cases. Specifically, current 49 U.S.C. 13709(e) allows shippers in undercharge cases brought by non-operating carriers to “elect” to proceed under either the settlement provisions of subsections (b)-(d) or “pursue . . . all rights and remedies that existed under this title on the day before such effective date.” A challenge to the reasonableness of the rate sought to be collected was one of the remedies available to shippers for all motor carrier transportation prior to the ICCTA, under former 49 U.S.C. 10701. Accordingly, under section 13709(f), if the shipper, as allowed under section 13709(e), “proceeds under this section to challenge the reasonableness of the legally applicable freight rate,” the Board has the authority to resolve the issue.

Under 49 U.S.C. 13709(a)(1)(A), however, the claim resolution provisions of section 13709 do not apply to claims brought by operating carriers, and thus there can be no election that was preserved for shippers of operating carriers to raise pre-existing defenses such as rate reasonableness to challenge carrier undercharge claims. Because there is no other provision providing the Board with rate reasonableness jurisdiction as to an operating carrier, we lack the authority to resolve rate reasonableness issues involving operating carriers such as LALCO.

In Marmon Holdings, Inc.--Petition for Declaratory Order--Rates and Practices of Certain LTL Motor Carriers, No. 41287 (STB served July 31, 1998) at 1 n.1, we addressed the reasonableness of the pre-ICCTA rates charged by operating carriers to be responsive to the court, which had stayed the matter pending before it in the expectation that we would address the issue. In contrast, the court here has neither stayed the matter pending a Board determination of rate reasonableness nor referred the matter to us. Accordingly, we see no basis on which we could address it.

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<sup>7</sup> The only motor carrier rate reasonableness provisions that remain for operating carriers involve rates for noncontiguous domestic trade shipments, collectively set rates, and rates for movements of household goods. No such rates are involved here. The tariff that the carrier seeks to apply here, Tariff ICC LALC 400, is not a bureau (collective rate) tariff.

## II. The Recyclables Issue

Exeter seeks to amend its complaint to have the Board consider an additional contention that undercharges may not be collected in this proceeding because the shipments at issue consisted of recyclable materials subject to the recyclable materials exemptions of former 49 U.S.C. 10701(f)(9)(C) and 10733(b). Unlike the rate reasonableness defense, the recyclable materials issue may be asserted against the undercharge claims of all carriers, regardless of their operating status.<sup>8</sup> Moreover, Exeter asserts that the Board is the proper forum for determining whether cargo qualifies as recyclable materials under the statute.<sup>9</sup> See, for example, Konica Imaging U.S.A., Inc. v. Willig Freight Lines, Inc., STB No. 42017 (STB served October 17, 1997).<sup>10</sup> LALCO does not dispute that a recyclables defense is generally available against undercharge claims, but responds that (1) the shipper's attempt to raise this issue must be denied as untimely and (2) the issue should be left for the court to resolve.

In view of the untimely nature of complainant's motion to amend and the absence of an indication that the court would favor Board consideration of the recyclables issue, we will not permit the requested amendment to the complaint. Exeter waited almost three years to amend its complaint to raise additional issues. Given the untimeliness of its filing, and the fact that the court has the authority and the ability to resolve the recyclables issue without our involvement, we will not allow amendment at this late date. Of course, however, should the court refer the matter to us or otherwise stay the proceeding before it and direct Exeter to refile its recyclables argument with us, we can address the recyclables issue.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

### It is ordered:

1. LALCO's motion to dismiss, filed on September 15, 1995, is granted.
2. Exeter's motion to amend its complaint, filed on July 30, 1998, is denied.

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<sup>8</sup> Ro-Mar Transportation Systems, Inc. v. Carolina Freight Carriers, STB No. 42029 (STB served Apr. 22, 1998) (Ro-Mar).

<sup>9</sup> Under former section 10733(b), reenacted as section 13709(h)(2), "recyclable materials" are defined as "waste products for recycling or reuse in the furtherance of recognized pollution control programs."

<sup>10</sup> Accord: Makita, U.S.A., Inc.--Petition for Declaratory Order--Certain Rates and Practices of Steve D. Thompson, Inc., No. 41533 (ICC served Jan. 31, 1995); Ro-Mar, supra.

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3. This decision is effective on its date of service.
4. A copy of this decision will be mailed to:

The Honorable Janet C. Hall  
United States District Court  
District of Connecticut  
915 Lafayette Boulevard  
Bridgeport, CT 06604-4706

Re: Case No. 3-95-CV-331

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary